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In re Application of Struble :
Application No. 09/894,213 :
Filing Date: June 27, 2001 :
Attorney Docket No. 10010610-1 :

OFFICE OF PETITIONS
Decision on Petition

This is a decision on the petition under 37 CFR 1.181, filed April 19, 2007, to withdraw the holding of abandonment.

The petition is **granted**.

Facts:

A final rejection was mailed September 21, 2004.

A reply to the final rejection was filed November 8, 2004. A review of the reply indicates pages 3, 4, 5, and 6 are **missing** from the application file.

An advisory action was mailed December 20, 2004.

A Notice of Appeal was filed January 21, 2005.

An Appeal Brief was filed February 10, 2005.

The Examiner's Answer was mailed May 5, 2005.

A reply brief was filed June 9, 2005.

The application was forwarded to the Board of Patent Appeals and Interferences ("Board").

On October 20, 2005, the Board remanded the case back to the examiner.

The Board indicated pages 3-6 of the papers filed November 8, 2004, are missing from the file. The Board indicated the examiner needed to have the pages scanned into the electronic file wrapper. The Board also cited several problems with the Examiner's Answer and required the examiner to submit a substitute examiner's answer.

The Office appears to have misconstrued the remand by the Board and interpreted the Board's objections to the Examiner's answer as objections to the Appeal Brief filed by petitioner. As a result, the Office mailed a Notice of Non-Compliant Brief on April 25, 2006. The Notice a shortened period for reply of one (1) month or thirty (30) days (whichever is later).

A reply to the April 25, 2006 Notice was not matched with the application file. As a result, a Notice of Abandonment was mailed March 7, 2007.

The instant petition was filed April 19, 2007.

Discussion:

Petitioner contends a reply to the April 25, 2006 Notice was filed on May 30, 2006.

Petitioner asserts a reply to the April 25, 2006 Notice was timely filed on May 30, 2006. In support of the petition, petitioner has submitted a date-stamped postcard receipt, indicating a "Response to Notification of 'Non-Compliant' Appeal Brief," was received by the Office on May 30, 2006. A copy of the May 30, 2006 Response accompanies the petition. The response bears a proper certificate of mailing in compliance with the requirements of 37 C.F.R. 1.8(a)(1). The certificate of mailing date is May 25, 2006.

The original papers filed May 30, 2006, were not matched with the file and cannot be located. However, M.P.E.P. 503 states, "[a] postcard receipt which itemizes and properly identifies the papers which are being filed serves as prima facie evidence of receipt in the PTO of all the items listed thereon on the date stamped thereon by the PTO." Accordingly, it is concluded that a Response to the April 25, 2006 Notice was timely filed in the Patent and Trademark Office but not matched with the application file.

Since the Notice of Non-Compliant Brief was erroneous, petitioner's response was a proper response.

Since petitioner filed a timely and proper response to the April 25, 2006 Notice, the application is not abandoned.

The Notice of Abandonment is hereby vacated and the holding of abandonment withdrawn.

Petitioner should note pages 3, 4, 5, and 6 of the papers filed November 8, 2004, are **missing** from the application file.

Technology Center Art Unit 3622 will be informed of the instant decision. Thereafter, the examiner will send petitioner a formal request for a copy of pages 3, 4, 5, and 6, filed November 8, 2004. The examiner will also take steps to prepare a substitute examiner's answer for submission to the Board of Patent Appeals and Interferences.

Telephone inquiries regarding this communication should be directed to Petitions Attorney Steven Brantley at (571) 272-3203.

A handwritten signature in black ink, appearing to read 'C. Brantley', is positioned above the printed name.

Charles Steven Brantley
Senior Petitions Attorney
Office of Petitions